

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICROSOFT CORPORATION, a Washington
corporation,

Plaintiff,

v.

MOTOROLA, INC., MOTOROLA
MOBILITY, INC., and GENERAL
INSTRUMENT CORPORATION.,

Defendants.

CASE NO. C10-1823-JLR

DEFENDANTS' OPPOSITION TO
MICROSOFT'S MOTION FOR LEAVE
TO FILE SUPPLEMENTAL
DECLARATION – **REDACTED**

**NOTED ON MOTION CALENDAR:
Friday, December 2, 2011**

Defendants Motorola, Inc. (now Motorola Solutions, Inc.), Motorola Mobility, Inc. and General Instrument Corporation (collectively, "Motorola") respectfully submit their Opposition to Microsoft's Motion for Leave to File Supplemental Declaration of Christopher Wion in Support of Motion for Partial Summary Judgment (D.I. 112). Because this declaration is irrelevant, untimely and is ultimately incomplete, the Court should deny Microsoft's request.

If the Court grants Microsoft's motion and considers the Wion Declaration (along with its sole exhibit, [REDACTED]), Defendants request that in the interests of fairness this relief be contingent on the Court allowing Motorola to file the

Supplemental Declaration of Kevin J. Post (“the Supplemental Post Declaration”) in support of Motorola’s opposition to Microsoft’s motion for summary judgment. This supplemental declaration attaches, as its sole exhibit, the Declaration of Timothy Kowalski (“the Kowalski Declaration”). The Kowalski Declaration provides necessary context for the statements made in [REDACTED] and will allow the Court to consider the complete record [REDACTED]

I. THE [REDACTED] IS UNTIMELY, IRRELEVANT AND INCOMPLETE

Microsoft’s supplemental declaration is untimely. To the extent Microsoft believes the information contained in [REDACTED] is relevant at all to its Motion for Partial Summary Judgment (which Motorola disputes), that declaration could have – and, indeed, should have – been submitted with its motion. *See* Fed. R. Civ. Proc. 6(c)(2) (“Any affidavit supporting a motion must be served with the motion.”). As [REDACTED] itself makes clear, [REDACTED]

[REDACTED] – well before Microsoft filed its motion.¹

In fact, [REDACTED]

[REDACTED] Now, after briefing has been closed for over six weeks, Microsoft moves for leave to file [REDACTED] with the Court. As discussed below, there is no reason to do so.

¹ *See* Declaration of Jennifer Ochs on Behalf of Microsoft Corporation, at ¶ 6, *In re Certain Gaming and Entertainment Consoles, Related Software, and Components Thereof*, Inc. No. 337-TA-752 (Nov. 11, 2011) (“Ochs Decl.”), Exhibit A to Wion Decl.

1 In addition to being untimely, the evidence Microsoft believes is contained in its
 2 declaration is irrelevant to this Court's consideration of its motion for summary judgment.
 3 Specifically, Microsoft's Amended Complaint seeks relief for Motorola's alleged refusal to offer
 4 *Microsoft* reasonable and nondiscriminatory ("RAND") licensing terms for, *inter alia*, Motorola's
 5 802.11 essential patent portfolio. Similarly, in its Motion for Partial Summary Judgment ("MSJ"),
 6 Microsoft asks "for partial summary judgment that Motorola has breached its contractual
 7 commitments to make available *to Microsoft* on [RAND] terms licenses to patents Motorola has
 8 declared essential" to the 802.11 standard (MSJ 1 (emphasis added)). Simply put, neither of
 9 Microsoft's claims has anything to do with [REDACTED]

10 [REDACTED] does not to support any
 11 elements of Microsoft's claims for breach of contract, promissory estoppel or waiver, each of
 12 which relates to Microsoft's allegations that Motorola did not offer *Microsoft* a RAND license for
 13 Motorola's 802.11 essential patents. Nor does [REDACTED] support Microsoft's
 14 request for judgment that Motorola breached any "contractual commitments" "*to Microsoft*."
 15 (MSJ 1) (emphasis added).

16 If anything, Microsoft's belated submission of [REDACTED] underscores that
 17 Microsoft's motion for partial summary judgment is premature and that Motorola's request for a
 18 continuance under Rule 56(d), Fed. R. Civ. P., should be granted.

19 **II. IF THIS COURT GRANTS MICROSOFT'S MOTION, IT SHOULD DO SO**
 20 **CONTINGENT ON MOTOROLA FILING THE SUPPLEMENTAL POST**
 21 **DECLARATION**

22 In addition to being irrelevant, [REDACTED] is incomplete and sets forth
 23 information for which Motorola has not had an opportunity to respond. Accordingly, if this Court
 24 grants Microsoft's Motion for Leave, Motorola respectfully requests that it do so contingent upon
 25 the admission of the attached Supplemental Post Declaration. This Declaration fills in missing
 26 information from [REDACTED] See, e.g.,
Guy Mitchell & Betty J. Mitchell Family Trust v. Artists Rights Enforcement Corp., 2011 WL

1 1900136, 7 (E.D.Wash. 2011) ("Plaintiff seeks leave to file a supplemental declaration from
2 Stanzak and the court will grant such leave since Mr. Rubin's version of events was presented in
3 conjunction with Defendant's reply and makes assertions to which Stanzak previously did not
4 have an opportunity to respond"); *Block v. Solis*, 2010 WL 2079688, 9 (W.D.Wash. 2010)
5 (considering supplemental declaration in order to have a complete record).

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 DATED this 28th day of November, 2011.

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***Attorneys for Defendants Motorola, Inc., Motorola
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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

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DATED this 28th day of November, 2011.



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